

Affidavit of Nancy Pollock

1 operation that impact both the 911 call answering function and the efficient use of the
2 telecommunications network. The Technical Operations Committee meets monthly.

3 **Q. PLEASE PROVIDE A BRIEF SUMMARY OF YOUR OPINION CONCERNING THE 911**
4 **SERVICE ALLEGEDLY BEING PROVIDED BY VONAGE.**

5 A. Based on my understanding of Vonage's proposed plan to route 911 calls, Vonage is in
6 violation of the Metropolitan 911 Board's Network Service Standards and the Consolidated 911
7 Plan . Moreover, the Metropolitan 911 Board has very serious concerns related to the substantial
8 public safety risks involved in the telephone service being offered by Vonage. Under Vonage's
9 proposed plan to route 911 calls, Vonage end users may be routed to the wrong PSAP, may have
10 difficulty reaching trained emergency personnel, and in some cases may not be able to reach
11 anyone at all if Vonage's proposed plan is allowed to continue.

12 **Q. PLEASE PROVIDE THE BASIS OF YOUR OPINION.**

13 A. For several months, Vonage has been holding itself out as providing local phone service
14 in Minnesota. Vonage has ignored state statutes, Minnesota Public Utilities Commission Rules,
15 and Metropolitan 911 Board Standards related to complying with 911 requirements.

16 Specifically, Vonage has failed to submit a 911 plan for review and approval by the Metropolitan
17 911 Board and the Commission. Minnesota Rules part 7812.0550, subpart 1 requires a carrier to
18 submit a comprehensive 911 plan to the Commission, Department of Commerce, Department of
19 Administration, and to the 911 Board before providing local service in Minnesota. That rule
20 further states that the Commission must not allow the carrier to provide service until it has
21 approved the 911 plan.

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1 Further, Vonage was attempting to obtain, or did obtain, administrative telephone numbers
2 associated with each of the Public Safety Answering Points (PSAPs) in the Twin Cities region,
3 for the purposes of sending 911 emergency calls to those numbers. Vonage did not contact me,
4 anyone else at my organization, nor anyone at the PSAPs to my knowledge to determine whether
5 this poses a public safety risk.

6 I believe several public safety risks exist if Vonage is allowed to route calls to these numbers.
7 For example, some of the administrative numbers associated with PSAPs are not emergency
8 numbers, are not staffed 24 hours a day and may be administrative office numbers where a caller
9 would reach voice mail if no one answers. These telephone numbers would be no different than
10 the phone numbers you or I have at our desk—the recipient of the call may not be able to summon
11 emergency personnel and may not be trained to deal with emergency calls, depending on where the
12 Vonage subscriber's 911 call is routed. Minnesota Statutes §403.03 requires police, fire, and
13 emergency medical and/or ambulance services to be available when a caller dials 911. Should a
14 telecommunications carrier such as Vonage route emergency calls to an incorrect number,
15 Vonage's actions would have the effect of violating this statute.

16 Further, the metropolitan 911 system is an Enhanced 911 system (E911) and requires all
17 telephone service providers to automatically send the actual ANI (Automatic Number
18 Identification) and ALI (Automatic Location Information) of the calling party. As listed in
19 Minnesota Statutes §403.07, subd. 3, wireline telecommunications providers are obligated to
20 provide their customer's names, addresses, and telephone numbers to PSAPs. This E911 system
21 and legal requirement ensures that if the caller is unable to communicate clearly during the
22 emergency, the 911 dispatcher can still summon emergency personnel to the correct location.

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1 The proposed Vonage solution does not provide Enhanced 911 features. Without this
2 information, determination of the appropriate emergency response agency in the area of the
3 caller's location is impossible.

4 The Vonage solution places their customers in a precarious and vulnerable position in that it
5 places a burden and liability on the customer to register their location, if they know it, in order to
6 provide 911 with the accurate location information in advance of a call. The customer has no
7 way of knowing the correct location information to enter, no way of verifying the location
8 information. There is no way for the 911 system to know if it is a correct location, and no way to
9 prevent false or misleading location information.

10 In addition, Vonage's proposed method of routing calls places additional burdens on PSAPs.
11 Staffing levels and priority systems would be significantly impacted with increased costs to the
12 PSAP. Any specialized handling of a small number of 911 calls which is inconsistent with
13 routine operations increases the potential of error and liability. Calls which do not provide the
14 complete information necessary to initiate an emergency response to the caller's request, or that
15 require the 911 call taker to spend more time with the caller trying to determine their location or
16 to interpret verbal cues from the caller will increase the need for additional PSAP staff. This will
17 become more acute as the Vonage type services continue to grow in popularity among the public
18 as primary voice communication service.

19 If a telephone company regulated under Minnesota Statutes Chapter 237 filed a 911 plan of the
20 type Vonage is using, the Metropolitan 911 Board would have filed comments with the
21 Commission recommending rejection of the 911 plan. I am very concerned that Vonage is

Affidavit of Nancy Pollock

1 marketing its phone service without complying with any 911 requirements, thereby putting their
2 customer's life and property at unnecessary risk.

3 Q. DOES THIS CONCLUDE YOUR AFFIDAVIT?

4 A. Yes, it does.

5

6

7 I declare under penalty of perjury under the laws of the United States of America and the State of
8 Minnesota that the foregoing is true and correct to the best of my knowledge.

9

10 Further affiant sayeth not.
11 Executed this 10th day of July, 2003.

12 Nancy A Pollock
13 Nancy Pollock
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18 State of Minnesota

19
20 County of Ramsey
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23 Subscribed an sworn to before me,

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25 a notary public, this 10 day of

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27 July, 2003.

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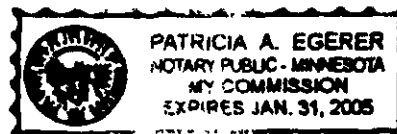
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My Commission expires Jan 31 2005



31 Patricia A. Egerer
32 Notary Public

Docket No. P6214/C-03-108
Exhibit 9

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of a Complaint Against)	Docket No. P6214/C-03-108
Vonage Holdings Corporation)	
)	
)	

AFFIDAVIT OF JIM BEUTELSPACHER

July 10, 2003

1 Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

2 A. My name is Jim Beutelspacher. I work for the Minnesota Department of Administration
3 as the Statewide 911 Program Manager. I have worked there for more than twenty years,
4 and my primary responsibility is oversight of the Statewide 911 Program. I have
5 extensive experience in 911 and other public safety-related matters in Minnesota and
6 nationally. I have been honored by selection as a Life Member of the Minnesota Chapter
7 of the Association of Public Safety Communications Officials (APCO) and as an APCO
8 International Senior Member and Life Member. I have been a member of the APCO
9 International 911 Committee for 22 years and chaired that committee from 1985 to 1988.
10 I have also been a guest lecturer at the Minneapolis Technical College Dispatcher
11 Training Program, a participant in the September 1996 Federal Communications
12 Commission ex-parte meeting regarding the 911 issues surrounding multi-line telephone
13 systems and one of the consensus agreement signatories, a founding member of the
14 National Association of State Nine One One Administrators (NASNA) and NASNA
15 President from 1996 through 1999, and a founding member of the National Emergency
16 Number Association (NENA) Institute for Emergency Number Professionals (ENP) and
17 Institute President from 1998 through 1999.

18 Q. PLEASE SUMMARIZE YOUR RESPONSIBILITIES AT THE DEPARTMENT OF
19 ADMINISTRATION.

20 A. The Statewide 911 Program is currently a function of the Minnesota Department of
21 Administration. My responsibilities include ensuring each 911 system meets minimum
22 technical and operational requirements compliant with Minnesota Statutes Chapter 403,
23 paying for the 911 networks and distributing grant funds from a state-wide telephone

Affidavit of Jim Beutelspacher

1 surcharge fund, and furnishing technical assistance as counties improve their 911 systems
2 and add new telecommunications service providers such as wireless and wire line
3 competitors to the incumbent local exchange carriers.

4 Q. PLEASE STATE YOUR CONCERNS ABOUT THE 911 SERVICE ALLEGEDLY BEING
5 PROVIDED BY VONAGE AND THE BASES OF YOUR OPINION.

6 A. I have numerous concerns related to Vonage's offering of local service, specifically
7 related to the fact that Vonage's proposed 911 service is out of compliance with
8 Minnesota Statutes in several ways. The Department of Administration, under
9 Minnesota Statutes Chapter 403, retains the responsibility for ensuring that Minnesotans
10 statewide have access to 911 service. Under Minnesota Statutes § 403.01, subd. 7, and
11 §403.05, subd. 3, for example, the Department of Administration is obligated to contract
12 with carriers in the state to ensure that 911 service is operational. Carriers, such as
13 Vonage, can apply for a waiver of all or portions of the 911 requirements on the basis of
14 economic infeasibility under Minn. Stat. §403.06, subd. 2.

15 Several months ago, I first learned of the local service being offered by Vonage and
16 contacted them in December 2002. At that time they affirmed that they were offering
17 service in Minnesota but their customers could not make 911 calls. The company also
18 informed us that they believed they did not have to comply with 911 requirements
19 because they saw themselves as an information service provider.

20

Affidavit of Jim Beutelspacher

1 To date, Vonage, has neither filed a 911 plan nor applied for a waiver. The Department
2 of Administration cannot carry out its statutory responsibilities if telecommunications
3 service providers such as Vonage refuse to comply with Minnesota law.

4 Vonage's refusal to comply with 911 requirements also means they have not submitted
5 911 fees from their end users. These fees are required under Minnesota Statutes §403.11,
6 and are deposited into an account to fund the management and operations of the 911
7 program. Minnesota Statutes §237.49 also references the requirement for local telephone
8 companies to collect these fees. A carrier who refuses to collect these fees deprives the
9 Minnesota 911 special revenue fund of the financial resources needed to ensure that 911
10 service remains available in Minnesota. For the biennium ending June 30, 2005 the
11 Minnesota State Legislature appropriated over 52 million dollars from this fund to
12 support 911 service with the expectation that all telecommunications service providers
13 would comply with Minnesota Statutes §403.11 by assessing the 911 fee to subscribers,
14 collecting the fee, and submitting it to the state. To date, no 911 fees have been deposited
15 with the state by Vonage.

16 I have also reviewed Vonage's website (accessed at www.vonage.com on June 27, 2003)
17 related to 911 service. Vonage is apparently now offering a type of 911 service.
18 However, Vonage places the burden of 911 service on the customer, and requires the
19 customer to "activate" 911 capability first before a customer may use it. I understand
20 activation includes the customer entering a location, but there is no mechanism to verify
21 that the customer provided location is accurate and consistent with 911 database
22 standards. I am also aware that Vonage is planning to or already routing emergency calls

Affidavit of Jim Beutelspacher

1 to non-emergency numbers at Public Safety Answering Points (PSAPs). This presents
2 numerous public safety concerns, not only for callers, but the recipients of such calls who
3 have not been consulted, asked permission of, or even notified of this non-standard
4 routing of calls outside of the 911 network.


5 As far as I know, some or many of these calls could be sent to administration lines which
6 are not answered by trained dispatchers or may be answered after hours by a recording
7 which, ironically, may contain instructions to hang up and dial 911 if the caller has an
8 emergency to report. Had Vonage submitted this plan as a 911 plan to the Commission, I
9 would have clearly filed comments recommending rejection of the plan.

10 Q. DOES THIS CONCLUDE YOUR AFFIDAVIT?

11 A. Yes, it does.

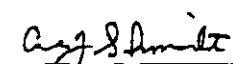
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13
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15 I declare under penalty of perjury under the laws of the United States of America and the State of
16 Minnesota that the foregoing is true and correct to the best of my knowledge.

17
18 Further affiant sayeth not.
19 Executed this 10th day of July, 2003.

20 
21
22 Jim Beutelspacher
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26 Signed before me this

27 07-10-03
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31 Notary Public
32



Docket No. P6214/C-03-108
Exhibit 10

THE
BROADBAND
PHONE COMPANY

Username

Password

HOME

RATE PLANS

AREA CODES

FEATURES

PRODUCT TOUR

LEARNING CENTER

SIGN UP

Forget

Voicemail Virtual Phone Number Fax Online Billing Device Warranty

Terms of Service

This is an agreement ("Agreement") between a Residential Customer or Small and Medium Enterprise ("Customer") and Vonage Holdings Corp. ("Vonage") for *communications services and related features* ("Service"). The term "Device" refers to an IP phone, software or any other IP connection device used in conjunction with Service. By activating Service with Vonage, Customer acknowledges that Customer has read and agrees to the terms of this Agreement

1. SERVICE

a. Use of Service

Customer authorizes Vonage to verify its creditworthiness with a credit reporting agency to determine customer's eligibility for Service. If Customer is approved for Service, Customer agrees not to resell the Service without the expressed written consent of Vonage. Customer also agrees not to use Service for any unlawful or abusive purpose or in such a way as to create damage or risk to Vonage's business, reputation, employees, facilities, third parties or to the public in general. Customer has no proprietary or ownership rights to or interest in a specific phone number or phone numbers ("Number") assigned to you by Vonage, and the number is not portable to any other service provider. Customers who choose to use the Service outside the United States do so at their own risk. Vonage can not care for any Customer who uses the Service outside the United States. Vonage does not guarantee that the Service will work outside of the United States.

b. Term

The term of this Agreement depends on the plan, feature or promotion you select and is described in separate subscription, calling plan, or rate plan ("Calling Plan") materials provided by Vonage. Customer agrees that it has reviewed the appropriate plan materials and fully acknowledges and agrees to the term of the Calling Plan. The term of this Agreement begins on the date that Vonage activates Service for the Number. Customer agrees to purchase the Service for the entire term. The term of the Service shall continue for the number of full months applicable to the term selected. If Customer attempts to terminate Service prior to the end of the term, they will be responsible for all charges, including without limitation, unbilled charges, which immediately become due in addition to a \$39.99 disconnect fee. After the expiration of Customer's Calling Plan, Customer will be required to sign up for a new Calling Plan (it may choose from all Calling Plans that are available at that time) in order to continue receiving Service from Vonage.

c. Unauthorized Usage

Customer may not program the Number into any equipment or infrastructure in or on which the number is intended or used as the origination or destination of a communication other than the Device that was provided by Vonage. Customer may not change the electronic serial number or equipment identifier of the Device. If the Device is stolen or Service is fraudulently used, Customer must immediately notify Vonage and provide such documentation and information as Vonage may request which includes, but is not limited to, a copy of a filed police report. Customer agrees to cooperate with Vonage in any fraud investigation and to implement any fraud prevention measure Vonage prescribes. Failure to provide reasonable cooperation will result in your liability for all fraudulent usage. A Small and Medium Enterprise Customer agrees to use the Device or Service for business use only. A residential customer agrees to

use the device or service for residential use only. Customer agrees to advise Vonage if service usage changes from either residential or business use.

d. Return Policy

If Customer's Device was purchased from Vonage and includes proof of purchase and original packaging and contents, and undamaged and in good working condition, Customer may return its Device within thirty (30) days of receipt for a full refund of the first month subscription charge, unless otherwise stated in the Calling Plan, if applicable. If Customer receives cartons and/or devices that are visibly damaged, please note the damage on the carrier's freight bill or receipt and keep a copy. Keep the original carton, all packing materials and parts intact and contact Vonage's customer care department immediately. Warranty coverage varies depending on the type of Device that Customer chooses. Please refer to the Vonage warranty materials included in the packaging of your Device(s).

2. CHANGES TO THIS AGREEMENT

Vonage may amend the terms of the Agreement, including all Calling Plans, with advance notice. If Customer does not agree to the amendment, Customer may terminate the Agreement by giving Vonage notice within 5 calendar days of the date Vonage notifies Customer, and will be charged a disconnect fee. If Customer uses the Service on the fifth day after Customer has been notified and/or does not notify Vonage of its intent to terminate the Agreement within 5 days, Customer is deemed to have consented to the change. Customer has the option to change its Calling Plan or features at any time by notifying Vonage provided that Customer complies with any requirements of the change including, where applicable, extending the term of the Agreement. Any change will take effect in the next billing cycle subject to pro rata billing during the then current billing cycle. If Customer transfers to a Calling Plan having a term that is shorter than its previous Calling Plan, it may remain obligated to the previous Calling Plan, at the option of Vonage.

3. CHARGES / PAYMENTS / DEFAULT / TAXES / TERMINATION

a. Billing and Payment of Charges

Customer is responsible for paying all charges posted to its account, including but not limited to, monthly Service, subscription fee, usage charges, advanced feature charges, Device charges, shipping, and others. Charges, including disputed amounts, must be paid by the date shown on the invoice. Vonage calculates all rates at one-minute increments, rounded up to the nearest minute, commencing upon the first use of any services being provided. Customer agrees that (a) it would be impractical to determine the exact amount of Vonage's damages if you fail to pay promptly, and (b) in the event of such failure, Customer shall pay Vonage the amount due plus liquidated damages of one and one-half percent (1.5%) per month (or any portion thereof) of any amount unpaid when due. Liquidated damages shall be eliminated or reduced to the extent permitted by applicable law. If Vonage accepts late or partial payments or payments marked "Paid in Full" or similar notations, it will not waive any of Vonage's rights hereunder nor will it constitute an accord or satisfaction.

Vonage reserves the right to bill and collect weekly or otherwise than monthly if the amount due in any point of a month is greater than \$150. Invoices are payable on receipt.

b. Credit Card Charges If Customer pays by credit card, it authorizes Vonage to charge the credit card account number for Vonage charges that accrue during the billing cycle. Customer reauthorizes Vonage to charge its designated credit card account each time it uses Service and/or as required by the Calling Plan Customer chooses. This authorization will remain valid until terminated by written notice to Vonage. It is expressly understood and agreed that the term for Service will automatically renew for a similar term until such time as Customer notifies us in writing of its intention not to renew. Vonage may terminate your account at any time, in Vonage's sole discretion, for declined credit cards or any other non-payment of account charges with the understanding, however, that Customer remains fully liable to Vonage for all charges accrued from usage of Service and all charges incurred by Vonage due to said declines, etc.

c. Default/Termination

Vonage reserves the right to terminate Service at Vonage's discretion. Vonage may discontinue the Service, for any reason including without limitation, if it has reason to believe that there have been attempts to hack or disrupt the system, or that the Service is being misused in any way. In the event of *Customer default – i.e. Customer does not pay any sum when due, breach any representations you made to Vonage, fail to perform any of your obligations set forth in this Agreement between Customer and Vonage, are suspected by Vonage of committing fraud, harming Vonage's network, harming Service to other customers, using Service in any way that damages Vonage – Customer will reimburse Vonage for its attorneys' and expert witnesses' fees and costs of investigation, collection and similar expenses incurred by Vonage in the enforcement of any right or privilege hereunder*. If this Agreement is terminated because of Customer default, Vonage may keep any charges or sums prepaid by Customer upon termination. Vonage may require reactivation charges to renew Service after termination or suspension.

d. Taxes

Any applicable sales, use, excise, public utility or other taxes, fees or charges imposed on Vonage as a result of providing the Service or a Device will be added to Customer's account when imposed or required by law. If Customer is exempt from payment of such taxes, it will provide Vonage with an original Tax Exempt Document. Tax exemption will only apply from the date Vonage receives the Tax Exempt Document.

e. Device Returns in the Event of Calling Plan Termination

If any Device(s) was provided to Customer in conjunction with the signing of a Calling Plan, and the Calling Plan is terminated for any reason, Customer must return the Device(s) to Vonage within 30 days of termination. Failure to do so will result in charging Customer's account and/or credit card the full amount of the Device.

4. LIMITATIONS

a. Limitation of Liability

Vonage's nonperformance hereunder shall be excused and Vonage shall not be liable if caused by act or omission of an underlying carrier, equipment, network or facility failure; equipment, network or facility upgrade or modification, acts of god; strikes; fire; war; riot, government actions; equipment, network or facility shortage; equipment or facility relocation or causes beyond Vonage's control, including without limitation the failure of an incoming or outgoing call, including a 9-1-1 emergency call to be connected or completed, or degradation of voice quality. Vonage's liability for any failure or mistake shall in no event exceed Service charges during the affected period. Vonage is not liable for any incidental or consequential damages of any type.

b. Indemnification

Customer agrees to defend, indemnify, and hold Vonage, its affiliates and agents and any other service provider, harmless from claims or damages relating to this Agreement. This paragraph shall survive termination of this agreement.

c. No Warranties on Service

Vonage provides no warranties of any kind on the Service. Statements regarding or descriptions of the Service, if any, by Vonage or Vonage's agents or installers are informational and are not given as a warranty of any kind.

d. No Warranties, or Limited Warranties, for Devices

If Customer purchased the Device new from Vonage and the Device included a limited warranty at the time of purchase, Customer must refer to the separate limited warranty document for information on the limitation and disclaimer of certain warranties. If Customer's Device did not include a limited warranty from Vonage at the time of purchase, Customer agrees that it accepts its Unit "as is" and that Customer is not entitled to replacement or refund in the event of any defect.

5. RESOLUTION OF DISPUTES

a. Mandatory Arbitration

Any dispute or claim between Customer and Vonage arising out of or relating to the Service or Device provided in connection with this Agreement shall be resolved by arbitration before a single arbitrator administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules. Judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. All claims shall be arbitrated individually and Customer will not bring, or join a punitive or certified class action to arbitration or seek to consolidate or bring previously consolidated claims in arbitration. The arbitrator shall have no authority to award punitive damages. Customer acknowledges that this arbitration provision constitutes a waiver of any right to a jury trial. b. Cost of Arbitration

All administrative fees and expenses of an arbitration initially will be divided evenly between Customer and Vonage. In all arbitrations, each Party will bear the expense of its own counsel, experts, witnesses and preparation of evidence in arbitration. The prevailing Party shall be awarded all attorneys' fees and costs attendant to each arbitration proceeding. The decision of the Arbitrator shall be final. The location of arbitration shall be New Jersey, unless otherwise agreed to by both Parties in writing.

6. MISCELLANEOUS

a. Signing Authority

Customer acknowledges that the Customer is of legal age, has received a true copy of this Agreement and has read and clearly understands the terms of this Agreement.

b. Privacy

IP telephony utilizes, in whole or in part, the public Internet and third party networks to transmit voice and other communications. Vonage is not liable for any lack of privacy which may be experienced with regard to the Service. Please refer to our Privacy Policy for additional information.

c. Notices

Notices to Customer shall be sent to the email address on file for Customer at Vonage and will be considered given on the date sent by Vonage. Customer is responsible for notifying Vonage of any changes to its email address. Notices to Vonage shall be considered given when received by Vonage at customercare@vonage.com.

[Corporate Information](#) :: [Contact Us](#) :: [Privacy Policy](#) :: [Terms Of Service](#) :: [Affiliates Program](#) ::

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Docket No. P6214/C-03-108
Exhibit 11

Proposed Vonage Customer Notice

Dear Vonage Customer:

Our records indicate that you have purchased Vonage Digital Voice from us. In response to an order from the Minnesota Public Utilities Commission, Vonage is sending you this notice to inform you that Vonage does not have a Certificate of Authority to provide telephone service in the State of Minnesota. Under Minnesota law, any telephone company providing telephone service in Minnesota is required to obtain a Certificate of Authority from the Minnesota Public Utilities Commission.

Vonage's Digital Voice service also does not comply with state requirements that apply to telephone service—in particular, our Digital Voice service does not comply with state laws concerning 911 emergency service. If you are concerned about Vonage's inability to provide 911 service, you should ensure that you have telephone service from a licensed telephone company in Minnesota.

The Minnesota Public Utilities Commission is currently holding proceedings to determine whether Vonage must comply with state laws that apply to telephone service. Should you have questions or concerns about these proceedings and how they relate to Vonage's Digital Voice Service, you can contact the Minnesota Public Utilities Commission at consumer.puc@state.mn.us, or 651-296-0406.

The Minnesota Department of Commerce will also be participating in proceedings related to Vonage's phone service, and is able to provide lists of licensed telephone companies in Minnesota. You may contact them at telecom.commerce@state.mn.us or 651-296-1255.

Sincerely,

Vonage Digital Voice

Exhibit 3

**Response of Vonage Holdings Corporation to
Minnesota Department of Commerce's
Request for Interim Relief**

PLEASE DATE STAMP & RETURN

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7643
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
TEL (212) 973-0111
FAX (212) 891-9598

July 22, 2003

VIA FACSIMILE AND OVERNIGHT DELIVERY

Burl W. Haar, Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East
Suite 350
St. Paul, MN 55101-2147

RECEIVED

JUL 23 2003

MN PUBLIC UTILITIES COMMISSION

Re: Docket No. P6214/C-03-108; Response of Vonage Holding Corporation to Request for Temporary Relief

Dear Mr. Haar:

On behalf of Vonage Holding Corporation, enclosed for filing are an original and fifteen (15) copies of the above-referenced Response. In your absence, we contacted Mark Oberlander, who gave Vonage permission to file its Response by fax.

Please date-stamp the enclosed extra copy of this filing and return it in the self-addressed, stamped envelope provided. Should you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,



Russell M. Blau
William B. Wilhelm
Tamar E. Finn

Enclosure

cc: John Rego, Vonage

**Before the
MINNESOTA PUBLIC UTILITIES COMMISSION**

In the Matter of the Complaint of the)
Minnesota Department of Commerce)
Against Vonage Holding Corp)
)
Regarding Lack of Authority to Operate)
in Minnesota)

Docket No. P6214/C-03-108

**RESPONSE OF VONAGE HOLDINGS CORPORATION
TO REQUEST FOR TEMPORARY RELIEF**

Vonage Holdings Corporation ("Vonage"), by and through its undersigned counsel, hereby responds to the request for temporary relief contained in the Complaint of the Minnesota Department of Commerce ("DOC") in the above-captioned proceeding, pursuant to Minn. Stats. § 237.462, subd. 7(e). Vonage reserves the right to respond more completely to the allegations of the Complaint when it files its Answer.

Vonage opposes the DOC's request for temporary relief. Temporary relief is not justified by the statutory criteria, and would not be in the public interest. Further, the DOC's allegations of a threat to public safety are exaggerated and misleading, and, while important, not directly relevant to the statutory criteria for granting temporary relief. Nor do the DOC's allegations amount to exigent circumstances justifying a waiver of the ten-day notice period required by Minn. R. 7829.2800.¹

Introduction and Summary

The DOC's Complaint alleges that Vonage is offering "telephone service" in Minnesota without being authorized by the Commission under Minn. Stat. § 237.16, subd. 1(b); and that Vonage has not complied with various requirements of the statutes and the Commission's rules applicable to telephone companies. The DOC seeks four forms of temporary relief: (1) prohib-

¹ Vonage's counsel received a telephone call from the Commission on July 18, 2003, only four business days prior to the Commission's consideration of the DOC's request for temporary relief. Moreover, the written notice was not issued until July 22, 2003, only two business days prior to the Commission's hearing. Vonage objects to this shortened notice period and reserves its right to contest any Commission decision on the basis that Vonage's due process rights were violated.

iting Vonage from "pursuing marketing efforts on all potential Vonage customers" until Vonage receives certification (Complaint, para. 56); (2) requiring Vonage to "immediately provide a copy of its contract with its Gateway provider" (Complaint, para. 56); (3) requiring Vonage to mail a notice to its current Minnesota customers stating that it is not a certificated telephone company (Complaint, para. 57); and (4) requiring Vonage, "within 5 days of the date of the Commission's hearing in this docket," to submit a 911 plan for approval (Complaint, para. 58).²

As shown herein, Vonage's service is not a "telephone service" and Vonage is not a "telephone company." Rather, Vonage is providing an Internet application that performs a net protocol conversion and permits voice communications between the Internet and the telephone network. Because neither Vonage's service, nor Vonage itself, is subject to the Commission's jurisdiction, the DOC is unlikely to prevail on the merits of its Complaint and the Commission should deny the DOC's request for temporary relief.

Further, even if the Commission harbors any doubt about the correct regulatory classification of Vonage's service, the Commission should deny the DOC's request for temporary relief because the DOC has not shown that its requested relief is in the public interest.³ The DOC's allegations that the public interest requires immediate relief are overblown, misleading, and inaccurate. First, the fact that the DOC has been investigating Vonage for over six months shows that there is no immediate need for relief. If the Commission grants the DOC's request for an expedited hearing, and if the DOC succeeds on the merits, the Commission could order the requested relief within two months — one-third of the time that the DOC has already been investigating Vonage.

² Apparently the DOC wants the Commission to issue a temporary relief order now that will not become effective until some undetermined future date. The purpose of this request is unknown. However, if the DOC believes that the submission of a 911 plan can wait until after a hearing, why can it not wait until after a decision on the merits?

³ Nor are the DOC's requests for temporary relief "necessary." For example, if the Commission determines it has jurisdiction and refers the DOC's Complaint for either a contested case or expedited proceeding, the DOC may use the discovery process to seek production of Vonage's agreement with its "gateway provider." The DOC has not shown why bypassing this process is necessary.

Second, it is inconceivable that Vonage's continued provision of service for an additional two months to approximately 426 customers in Minnesota — without the overbroad, prejudicial and unconstitutional restrictions on marketing and customer notice requested by the DOC — would have any meaningful impact on competition in Minnesota. To the contrary, granting DOC's requested relief would deprive Minnesota consumers of the ability to access an exciting, innovative new Internet service.

Third, the DOC's repeated insinuations that Vonage is creating a risk to public safety by employing improper 911 procedures are both false and misleading. Vonage's interim 911 solution is already used by other entities in Minnesota and Vonage has advised its customers of the limitations of its 911 service. Ironically, because telephone companies may not provide 911 service until their 911 plans are approved, granting the DOC's requested 911 relief would leave Vonage customers with *less* access to emergency services than they have now, pending the outcome of this proceeding. Public safety is important and Vonage is willing to work with the DOC to address 911 concerns. However, the particular statutory criteria the DOC must meet to receive temporary relief is to show that the relief protects the public interest in competition, not the public interest in safety.

Finally, it is not clear that the DOC's requests for temporary relief are within this Commission's jurisdiction or technically feasible. First, the Commission does not have jurisdiction to order Vonage to cease marketing its services to customers nationwide, as the DOC appears to request. Second, because Vonage markets its service nationally and over the Internet, Vonage does not target any marketing specifically to Minnesota consumers so any restrictions on Vonage's marketing would necessarily impact Vonage nationwide. Third, because Vonage's customers may purchase Vonage's service over the Internet, at retail stores, or through websites such as Amazon, and connect to Vonage's service over the Internet, Vonage does not know where a customer is located at any given time. In sum, it may not be technically feasible to limit Vonage's marketing to Minnesota consumers or to mail a notice to Vonage's customers that use its service in Minnesota.

Because the DOC is not likely to succeed on the merits of its Complaint and the requested relief is not in the public interest and may not be technically feasible, the Commission should deny the DOC's request for temporary relief.

Vonage DigitalVoice™

Vonage DigitalVoice™ service is an innovative offering that Vonage markets as an "alternative to traditional telephone service."⁴ Although it resembles telephone service in many respects, it also has crucial technical and functional differences. Vonage's service allows its customers to send and receive asynchronous digital IP data packets over the Internet, and provides conversion services to allow these packetized communications to interface with the analog and synchronous digital protocols of the Public Switched Telephone Network ("PSTN"). To access this service, customers must have a high-speed Internet connection, such as a DSL or cable modem service. Vonage does not provide these Internet connections. The customers can attach customer premises equipment ("CPE"), such as a router (in certain configurations) and a Cisco Multimedia Terminal Adapter ("MTA") (i.e., a computer), to their Internet connection. Although the customer may purchase the MTA from Vonage, it is also available from other retail outlets and on the Internet. Once the customer has installed the appropriate CPE and configured the requisite software, the customer can place and receive calls by establishing a connection over the Internet to Vonage's server.

Vonage's network consists of media gateways that provide an interface between the Internet and the PSTN (including net protocol conversion between the incompatible digital formats used by these two networks), and computer servers that process voice stream data set-up signaling and route packetized data between the media gateways and other points on the Internet. Vonage does not provide either Internet access or telecommunications services. Vonage pur-

⁴ See "About Vonage" in Exhibits 1 and 6 to the DOC's Complaint. Although the DOC attaches these examples of Vonage materials that distinguish DigitalVoice as an "alternative to traditional telephone service," the DOC stubbornly ignores Vonage's own description of its service and instead repeatedly claims that Vonage represents itself as a traditional telephone provider.

chases both Internet access and telecommunications services from other parties so that it can communicate with its customers over both networks.

Legal Standard for Temporary Relief

Minn. Stats. § 237.462, subd. 7(c), establishes the legal standard for temporary relief, as follows:

(c) After notice and an opportunity for comment, the commission may grant an order for temporary relief under this subdivision upon a verified factual showing that:

- (1) the party seeking relief will likely succeed on the merits;
- (2) the order is necessary to protect the public's interest in fair and reasonable competition; and
- (3) the relief sought is technically feasible.

An order for temporary relief must include a finding that the requirements of this subdivision have been fulfilled.

Under the plain terms of the statute, temporary relief can be granted only if *all three* of the specified criteria have been fulfilled. In this case, none of the three criteria is satisfied, as explained below. Thus, the DOC's request for temporary relief should be denied.

The Department Is Not Likely to Succeed on the Merits

As an initial matter, Vonage submits that the issue of whether the Commission can regulate services provided over the Internet is a novel legal question that has never before been addressed by this agency or the Minnesota courts. Further, because the potential pre-emptive effect of Federal law is unclear in this context, the Commission may determine that it does not even have jurisdiction to hear the DOC's Complaint. These questions deserve full and thoughtful consideration by the Commission, and should not be prejudged hastily in the context of a request for temporary relief. The Commission should not find the DOC is "likely to succeed" on the merits where its complaint hinges on a substantial, unresolved question of law.

If the Commission does consider the merits of DOC's Complaint, however, it should find that DOC is not likely to succeed because Vonage is not, in fact, providing telephone service.

Vonage's service is not a "telephone service" within the statutory meaning of that term. Vonage does not provide its customers with facilities for communication; rather, the customers must obtain access services independently from an ISP. Although Vonage's service uses communications facilities, a key function of DigitalVoice is to convert the format of the customer's transmission to connect incompatible network protocols. This type of net protocol conversion is the hallmark of an information service, not a communications service, and is not within the scope of the Commission's regulatory jurisdiction.

As noted earlier, Minn. Stat. § 237.16 requires Commission authorization before a person may "provide telephone service in Minnesota[.]" The term "telephone service," however, is not defined by statute. Section 237.01 defines "telecommunications carrier" and "telephone company," but both of those definitions also contain and depend on the undefined term "telephone service." Therefore, the Commission must rely on the Minnesota courts' interpretation of the term, as well as the federal definitions which may supplant the term.

The Minnesota Supreme Court has considered the meaning of "telephone service" in *Minnesota Microwave, Inc. v. Public Service Commission*, 291 Minn. 241, 190 N.W.2d 661 (1971). It stated that, in the absence of a statutory definition, it would interpret the statutory language as a matter of law, based upon the operative facts found by the Commission. 190 N.W.2d at 664. In that case, the Court held that the statutory definition did not encompass a provider of one-way closed circuit microwave systems for transmitting educational television signals. It stated, among other things, that "[i]t appears that for the most part the term 'telephone service' refers to the supplying of facilities for two-way communication." 190 N.W.2d at 665. However, it also considered the Federal Communications Commission's decisions concerning the meaning of "telephone exchange service," and the legislative purpose of the statutes regulating telephone services. 190 N.W.2d at 666-67. Subsequent decisions by this Commission confirm that the mere existence of a two-way communication is not enough to classify a service as "telephone service," since the Commission decided that the provision of conference calling (which obviously requires two-way communication) is not within that definition. *Petition of A*

Business Conference Call, Inc., Docket No. P-488/TC-97-1814, 1998 WL 1754268 (Minn. PUC). Rather, all aspects of a particular service must be considered in determining whether it falls within the ambit of the legislative phrase “telephone service.” The Commission cannot make the necessary findings of facts to determine whether it has statutory jurisdiction until after Vonage answers the Complaint and both parties have an opportunity to submit evidence; and it cannot rationally determine that the DOC is “likely to succeed” in the absence of such facts.

Further, this Commission has previously relied upon FCC precedent for guidance in interpreting the scope of its regulatory jurisdiction.⁵ In this case, the FCC has determined that services like Vonage’s are not “communications” and therefore are not subject to regulation under Federal law. Vonage’s service is an “information service” pursuant to 47 U.S.C. § 153(20). Federal law defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the facilities used.” 47 U.S.C. § 153(46). The term “telecommunications” is defined as “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). The definition of “telecommunications” and “telecommunications service” can be contrasted with “information service,” which is defined by the 1996 Act as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the

⁵ See, e.g., *AT&T Communications of the Midwest, Inc. v. US West Communications Inc.*, Order, Docket Nos. P-421/C-99-1183 (Minn. P.U.C. Aug. 15, 2000) (recognizing that the MPUC must consider the jurisdiction of the Federal Communications Commission in certain instances); *Petition of US West Communications, Inc. for a Determination that ISP Traffic Is Not Subject to Reciprocal Compensation Payments Under the MFS/US West Interconnection Agreement*, Order Denying Petition, Docket Nos. P-3167, 421/CP-99-529 (Minn. P.U.C. Aug. 17, 1999) (considering the Federal Communications Commission’s Declaratory Ruling in its intercarrier compensation for ISP-Bound traffic proceeding in determining the appropriate compensation for such traffic); *Bridge Water Tel. Co.*, Order, Docket Nos. P-427, 3075, 3081, 421/C-92-9 (Minn. P.U.C. May 11, 1993) (analyzing extent of Federal Communications Commission jurisdiction over certain services).